

STATE OF MICHIGAN
COURT OF APPEALS

FIFTH THIRD BANK,

Plaintiff-Appellant,

v

ROGER WERTZ and JAMIE WERTZ, d/b/a
DMC UNLIMITED,

Defendants-Appellees,

and

KIM A. LARSON,

Intervening Defendant-Appellee.

UNPUBLISHED

January 25, 2005

No. 250058

Mason Circuit Court

LC No. 03-000216-PD

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court order dismissing this case with prejudice. We affirm in part, and reverse and remand in part. This case is being decided without oral argument under MCR 7.214(E).

Plaintiff first argues that the circuit court erred in ruling that plaintiff's claims did not exceed \$25,000 and, thus, were not within the jurisdictional threshold of the circuit court. We agree. We review a jurisdictional ruling de novo. *Vargas v Hong Jin Crown Corp*, 247 Mich App 278, 282; 636 NW2d 291 (2001).

MCL 600.8301(1) provides that "[t]he district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed \$25,000.00." It follows that the circuit court, as the court of general original jurisdiction, has trial level jurisdiction over civil actions with an amount in controversy exceeding \$25,000. See Const 1963, art VI, § 13 (providing that the circuit court "shall have original jurisdiction in all matters not prohibited by law").

Our Supreme Court's Administrative Order 1998-1 ("AO 1998-1") directs that, absent a stipulation regarding the matter, a circuit court may not transfer an action to a district court under MCR 2.227 based on the amount in controversy unless "[f]rom the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable

jurisdictional limit of the district court.” AO 1998-1, 457 Mich lxxxv-lxxxvi. Accordingly, in *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 474-475; 628 NW2d 577 (2001), this Court reviewed the allegations of the relevant complaint and pertinent points of law, to determine whether the amount in controversy appeared to a legal certainty to be within the jurisdictional limit of the district court. The present case differs from *Etefia* in that the trial court in this case simply dismissed the complaint while the trial court in *Etefia* transferred that case to a district court. *Id.* at 475. However, while AO 1998-1 and *Etefia* are expressly directed to when a circuit court may transfer jurisdiction to a district court based on the amount in controversy, it is apparent that a circuit court may not dismiss a case in its entirety based solely on the amount in controversy. In such circumstances, the trial court cannot be legally certain that a case was outside the jurisdiction of the circuit court based on the amount in controversy.

A prevailing party does not have a right to recover attorney fees under Michigan law. See, e.g., *H A Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 429; 670 NW2d 729 (2003) (attorney fees not recoverable unless expressly allowed by statute, court rule, or judicial exception). But a contractual provision requiring a breaching party to pay the other side’s attorney fees is judicially enforceable to the extent of recovering reasonable attorney fees. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195-196; 555 NW2d 733 (1996).

Plaintiff attached to its complaint copies of documents entitled “Security Agreement,” which appear to grant plaintiff a security interest in certain assets of the Larsons and Larson Enterprises. Each security agreement included language on its front page stating in relevant part, “This security interest secures payment and performance of all indebtedness and obligations now and hereafter owing by debtor to bank, including all obligations of Debtor under this Agreement” The security agreements listed either Kimberly (Kim) and John Larson or Larson Enterprises as debtors. Further, each security agreement included a provision stating in relevant part:

Debtor will indemnify Bank with respect to all losses, damages, liabilities and expenses (including attorneys’ fees) incurred by Bank by reason of any failure of Debtor to comply with any of Debtor’s obligations under this Agreement

Accordingly, by the plain language of each of these security agreements, the security interest that each agreement granted in certain assets secured all obligations owed under that agreement by either the Larsons or Larson Enterprises. One of the obligations under that agreement was payment of attorney fees incurred by plaintiff due to a failure by the Larsons or Larson Enterprises to comply with the security agreement. Thus, plaintiff is correct in indicating that, to the extent it is entitled to recover attorney fees based on violations by the Larsons or Larson Enterprises of the security agreements, the security interests in assets granted plaintiff by those agreements apply to that obligation of the Larsons and/or Larson Enterprises to pay plaintiff’s attorney fees.

Plaintiff’s claims are based on the defendant Wertzes inappropriately taking possession of assets in which plaintiff had a security interest. If plaintiff is able to establish that this occurred, then it would have a right to recover those assets or proceeds the Wertzes have obtained from disposing of those assets to the extent of the total obligation of the Larsons and

Larson Enterprises under the security agreements which includes their obligation to pay plaintiff's attorney fees. By its nature, this attorney fee obligation is essentially open ended until plaintiff obtains a recovery. Thus, it cannot be stated to a legal certainty that the amount in controversy is less than \$25,000. The Wertzes indicate that the amount of attorney fees sought by plaintiff are exorbitant and, thus, do not warrant plaintiff reaching the \$25,000 jurisdictional threshold of the circuit court. But, as discussed above, AO 1998-1 and *Etefia* make clear that it is only appropriate for a circuit court to hold that it lacks jurisdiction over a case due to the amount in controversy if it appears to a *legal certainty* from the allegations of a complaint that the amount in controversy is less than \$25,000. At least without improperly considering evidence beyond the complaint, it is not clear that plaintiff is seeking exorbitant attorney fees or that the total amount that plaintiff might recover in this case, including attorney fees secured by the security agreements, is less than \$25,000. Thus, the trial court erred by dismissing plaintiff's complaint based on the amount in controversy.

Plaintiff next argues that the trial court erred by dismissing its constructive trust claim.¹ We disagree. We review the grant of a motion for involuntary dismissal for clear error. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995).

Imposition of a constructive trust is an equitable remedy. *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). Equitable jurisdiction is recognized where a legal remedy will not afford adequate relief. *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 561; 492 NW2d 246 (1992). Plaintiff's claims against the Wertzes are based on allegations that they wrongly retained assets that should have been turned over to plaintiff. Under MCL 600.2920, a civil action may be brought to recover possession of tangible property that has been wrongly detained. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 713-714; 583 NW2d 232 (1998). Accordingly, plaintiff's claim and delivery count provides an adequate basis for relief with regard to any of the assets at issue that remain in the Wertzes' possession. With regard to any assets that the Wertzes may have sold or otherwise disposed of, conversion consists of an act of dominion wrongly exerted over another's personal property. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 158; 626 NW2d 917 (2001). In accordance with the general rule for conversion actions, plaintiff would be able to recover damages for property wrongly converted by the Wertzes that was no longer in their possession based on the value of that property at the time of the conversion. *Ehman v Libralter Plastics, Inc*, 207 Mich App 43, 45; 523 NW2d 639 (1994). Thus, the trial court properly dismissed plaintiff's constructive trust claim. Such an equitable claim was inappropriate because adequate relief was available through plaintiff's legal claims of claim and delivery and conversion.

¹ We note that the trial court's remarks reflect that it dismissed the constructive trust claim for reasons independent of the \$25,000 jurisdictional threshold of the circuit court.

We reverse the circuit court order with regard to the dismissal of plaintiff's claims of claim and delivery and conversion, but affirm the dismissal of the constructive trust claim. The case is remanded to the trial court for further proceedings on the former claims only. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello